Foreign Policy and the Luxembourg Court: How to Address a Key Roadblock to EU Accession to the ECHR

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The Court of Justice of the European Union recently declared the European Union cannot join the European Convention on Human Rights (ECHR) unless the Luxembourg court has jurisdiction over all questions of EU law that reach the Strasbourg court – including Common Foreign and Security Policy. The reasons behind this decision have been discussed elsewhere. The big question now is, how to proceed?

Recall that the EU is legally obliged to join the ECHR without affecting the Union's competences or the powers of its institutions, and while "preserving the specific characteristics of the Union and Union law" (Article 6(2) TEU and Protocol 8). Recall further that Article 24(1) TEU and Article 275 TFEU limit the Court's jurisdiction over CFSP.

Also, let's assume for present purposes the Luxembourg court is right that it needs jurisdiction over every question of EU law that reaches the Strasbourg court – including common foreign policies. After all, who really wants the EU to be sued in Strasbourg on the basis of a CFSP measure that was interpreted by only one Member State court, say Hungary's, without affording Luxembourg a chance to weigh in?

Unless we abandon accession, this leaves the following possibilities.

The most obvious one is to amend the Treaties to grant the Luxembourg court more jurisdiction over Common Foreign and Security Policies. But amendments are difficult and invite a host of unrelated bargaining. Plus, implicit in yet another accession-related amendment would be the suggestion that Article 6(2) TEU was itself in violation of the Treaties or ineffectual because its conditions could not be met.

A second commonly understood path would be to accede to the Convention with a broad exemption for Common Foreign and Security Policy matters over which the court does not have jurisdiction. This might be seen as complying with Article 6(2)'s conditional accession mandate. But such an exemption could create a troubling human rights gap, and be rejected by non-EU signatories to the Convention or the Strasbourg court.

A third way I wish to explore has been, so far, ignored. It draws generally on the theory of *plural constitutionalism*, which need not be laid out or understood in any depth here. Suffice it to say that plural constitutionalism takes the European Union to be a set of intertwined constitutional systems, marked by "mutually embedded openness." Plural constitutionalism can similarly be found in a set of intertwined institutions (as opposed to systems) that also negotiate their conflicts in principled mutual accommodation.

Details aside, plural constitutionalism turns the interpretation of shared constitutional norms into a collective endeavor among multiple actors. Regardless of whether you sign on to the theory, this is where the third way picks up.

I suggest taking a fresh look at the current limits of CJEU jurisdiction.

The European Commission submitted in Opinion 2/13[1] that the Luxembourg Court already has jurisdiction over human rights complaints concerning Common Foreign and Security Policy (CFSP). For any complaint to succeed in Strasbourg, the individual must be "directly affected." The Commission pushed for a broad interpretation that foreign and security policy decisions by the Council that cause such harm by binding legal norm fall within Luxembourg's jurisdiction over direct actions challenging "restrictive measures" under Article 275 TFEU. Citing *Segi*, the Commission further submitted the Court can hear preliminary references on such matters as well.

The Commission also argued that for harm caused by material (e.g., physical) action, the individual can seek damages under Article 268 TFEU, and that this is an independent cause of action not displaced by Articles 24

TEU or 275 TFEU. At the hearing, the Commission added that monitoring compliance with Article 40 TEU (which says CFSP shall not affect the remaining powers and procedures of the Union) provides further jurisdiction for the CJEU over foreign and security policy matters.

The Advocate General and several Member States rejected this position as neither convincing nor necessary, but the Court did something else.

The Court summarized the submission as attempting "to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR" (para. 251).

In a carefully worded passage, the Court then said it had "not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions;" that in any event "certain acts adopted in the context of the CFSP fall outside of the ambit of judicial review by the Court of Justice," and that "on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights" (paras. 251-254).

Read closely: the Court did not reject the Commission's position. Instead, the Court meant: (1) there is uncertainty about its jurisdiction over CFSP; (2) some acts fall outside its jurisdiction (without deciding, however, whether those acts lead to claims before the Strasbourg court); and (3) there was no safeguard in the draft accession agreement to preclude a CFSP related claim before the ECtHR that, for whatever reason, fell outside the Court's jurisdiction.

This says preciously little about the Court's ultimate view on the Commission's position. It suggests, instead, the Court refused to give a comprehensive evaluation on the record before it. And in the face of this uncertainty, the Court wanted some safeguard against the possibility of EU law related claims in Strasbourg that fall outside Luxembourg's jurisdiction.

If that is a fair reading, the third way forward comes fully into view. In revising the accession agreement, Member States might agree that the Luxembourg court already has jurisdiction over all foreign and security policy measures that make it to Strasbourg. They might be inclined to do so now that they understand the Court's principled reason for such jurisdiction, that EU accession depends on it, and that such an interpretation avoids the need for a further Treaty amendment.

In revising the accession agreement and writing internal rules, Member State governments and the EU Council might signal their endorsement of this interpretation by, for instance, expressly acknowledging that all CFSP related claims are subject to the "prior involvement" of the CJEU. (This is where the ECtHR allows the CJEU to rule on matters that come to Strasbourg before having made their way to Luxembourg.) Indeed, the Commission interpreted the prior involvement procedure in just this way.

This would, of course, be open to criticism that such an "interpretation" violates the rule in Article 6(2) TEU and Protocol 8 that accession should not affect Union competences or the powers of its institutions. One might respond, however, that accession had not enlarged the CJEU's jurisdiction, but led only to its clarification.

The CJEU might nonetheless want a guarantee that nothing outside its own jurisdiction can come to the ECtHR. Whether that was granted or not, adopting the Commission's interpretation means such an "exemption" becomes immaterial – it encompasses nothing.

Succinctly put: in dialogue with the political branches and the Member States, the CJEU might find that even in the absence of any Treaty amendments it has jurisdiction over all of EU law (including CFSP) that reaches the Strasbourg court. If that were to happen, a key roadblock to EU accession to the ECHR would be cleared.

[1] Commission Doc. SJ.F(2012) 2701339 (July 3, 2013), on file with author.

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